Supreme Court, U.S.
FILED
JUL 24 1991
OFFICE OF THE CLERK

(2)

No. 90-1957

In The

Supreme Court of the United States

October Term, 1991

E. J. McMANUS AND ALL OTHERS SIMILARLY SITUATED,

Petitioners,

v.

STATE OF IOWA, IOWA DEPARTMENT OF REVENUE AND FINANCE AND GERALD BAIR,

Respondents.

Petition For Writ Of Certiorari To The Supreme Court Of Iowa

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Do the Tax Injunction Act (28 U.S.C. § 1341) and the principle of comity bar the federal court from hearing the Petitioners' tax refund claim?

2. Does the eleventh amendment bar the federal court from hearing the Petitioners' tax refund claim?

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CONSTITUTIONAL PROVISIONS AND STATUTES

The eleventh amendment bars the federal court from hearing the Petitioners' tax refund claim. It states:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

Also, there is a statutory provision which bars the federal court from hearing the Petitioners' tax refund claim. The Tax Injunction Act (28 U.S.C. § 1341) states:

> The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

Iowa statutory provisions which provide a plain, speedy and efficient remedy include Iowa Code §§ 421.10, 422.28 and 422.29 (1991). *See also* Iowa Code § 17A.19 (provides for judicial review of agency action). These Iowa statutory provisions state:

> **§ 421.10 Appeal period – denial of taxpayer's claim.**
>
> The appeal period for revision of assessment of tax, interest, and penalties set out under section . . . *422.28*, . . . applies to appeals to notices from the department denying changes in filing methods, *denying refund claims*, and *denying portions of refund claims for the tax covered by that section*.

(Emphasis added).

422.28 Revision of tax.

A taxpayer may appeal to the director for revision of the tax, interest or penalties assessed at any time within sixty days from the date of the notice of the assessment of tax, additional tax, interest or penalties. The director shall grant a hearing and if, upon the hearing, the director determines that the tax, interest or penalties are excessive or incorrect, the director shall revise them according to the law and the facts and adjust the computation of the tax, interest or penalties accordingly. The director shall notify the taxpayer by mail of the result of the hearing and shall refund to the taxpayer the amount, if any, paid in excess of the tax, interest or penalties found by the director to be due, with interest after sixty days from the date of payment by the taxpayer at the rate in effect under section 421.7 for each month or a fraction of a month. The director may, on the director's own motion at any time, abate any portion of tax, interest or penalties which the director determines is excessive in amount, or erroneously or illegally assessed.

422.29 Judicial review.

1. Judicial review of actions of the director may be sought in accordance with the terms of the Iowa administrative procedure Act. Notwithstanding the terms of said Act, petitions for judicial review may be filed in the district court of the county in which the petitioner resides, or in which the petitioner's principal place of business is located, or in the case of a nonresident not maintaining a place of business in this state either in any county in which the income involved was earned or derived or in Polk county, within sixty days after the petitioner shall have received notice of a determination by the director as provided for in section 422.28.

. . . .

3. An appeal may be taken by the taxpayer or the director to the supreme court of this state irrespective of the amount involved.

STATEMENT OF THE CASE

On November 28, 1989, E. J. McManus filed a class action in the United States District Court, Northern District of Iowa, Cedar Rapids Division, seeking refunds of income taxes paid to the state of Iowa. He claims that the income taxes paid to the state of Iowa were illegally imposed on retirement income of federal retirees. As authority, he cites to *Davis v. Michigan Department of Treasury*, 489 U.S. 803 (1989).

The *Davis* decision could have a decisive impact on Iowa. In Iowa (until 1989 Iowa Acts, ch. 228 was enacted), state and its political subdivisions' employees' retirement benefits were exempt from Iowa income tax. However, pursuant to Iowa Code § 422.5(6) (1989) (repealed, 1989 Iowa Acts, ch. 228), federal retirement benefits (in excess of $5,627 on a single return and in excess of $8,184 on a joint return) were taxed. This was the same type of tax treatment that existed in Michigan. The Iowa legislature, as a result of the United States Supreme Court decision in *Davis v. Michigan Department of the Treasury*, enacted 1989 Iowa Acts, ch. 228 so that Iowa and federal retirees are treated the same.

A question arises with respect to tax refunds and whether Iowa will have to pay them. Iowa Code § 422.73(2) provides for certain refunds if timely claimed.

If not timely claimed, there can be no refund, even if the refund claim is based upon the unconstitutionality of a tax statute. *Burrill v. Locomobile Co.*, 258 U.S. 34 (1922). Whether an Iowa court or the Supreme Court would hold that the Supreme Court's decision in *Davis v. Michigan Dept. of Treasury* should not operate retroactively to require that refunds be given is unanswered at this point.

At page 14 of the Petition for Writ of Certiorari, Petitioners cite to *Hagge v. Iowa Department of Revenue and Finance*, Docket No. 90-20-2-0216. This is a test case in Iowa pertaining to whether *Davis v. Michigan* should be applied retroactively or prospectively. Although the caption of the case lists only Mr. Hagge, the case is being litigated as a test case on behalf of the National Association of Retired Federal Employees.

Instead of pursuing his state administrative remedies in litigating the retroactive versus prospective application of *Davis v. Michigan*, as the National Association of Retired Federal Employees is, McManus wants to litigate the matter in federal district court for himself and all others similarly situated, seeking a refund of income tax paid. The state of Iowa and the Iowa Department of Revenue and Finance moved to dismiss, claiming the federal district court lacked subject matter jurisdiction under the principles of comity, the Tax Injunction Act (28 U.S.C. § 1341) and the eleventh amendment of the United States Constitution.

On June 14, 1990, the federal district court dismissed McManus' action for lack of subject matter jurisdiction. McManus appealed this decision to the Eighth Circuit Court of Appeals. On April 3, 1991, the Eighth Circuit

Court of Appeals affirmed the district court without opinion saying the case would have no precedential value.

SUMMARY OF THE ARGUMENT

McManus has cited no authority which is in conflict with the district court decision and Eighth Circuit Court's affirmation of the decision.

Under Iowa Code §§ 421.10 and 422.28, the Iowa test case (*Hagge v. Iowa Department of Revenue and Finance*, Docket No. 90-20-2-0216) will be argued before the Director of Revenue and Finance on July 30, 1991. Assuming an unfavorable decision for federal employees, the National Association of Retired Federal Employees will seek judicial review in Iowa district court and ultimately the case can be appealed to the Iowa Supreme Court. *See* Iowa Code § 422.29. Iowa taxpayers (retired federal employees) have a plain, speedy and efficient remedy where they have a full hearing before the agency and judicial review which allows them to raise any and all legal arguments, including constitutional objections, concerning their requests for income tax refunds.

The eleventh amendment also bars the federal courts from hearing Petitioners' tax refund claim. *Edelman v. Jordan*, 415 U.S. 651 (1974); *accord Melof v. Hunt*, 718 F. Supp. 877 (M.D. Ala. 1989) (a *Davis* related lawsuit). Thus, since no basis for the grant of certiorari has been presented, certiorari should be denied.

REASONS TO DENY THE PETITION

I. PETITIONERS HAVE IDENTIFIED NO SPECIAL OR IMPORTANT REASONS WHY A PETITION FOR WRIT OF CERTIORARI SHOULD BE GRANTED.

Petitioners have cited no conflicting decisions by other United States courts of appeals on the issues, nor have they cited decisions departing from the accepted understanding of 28 U.S.C. § 1341 as set forth by the district court and affirmed by the Eighth Circuit Court of Appeals. The circuit court's decision is consistent with decisions of other courts. *See, e.g., Rosewell v. LaSalle National Bank*, 450 U.S. 503 (1981); *Fair Assessment in Real Estate Ass'n v. McNary*, 478 F. Supp. 1231, 1234 (E.D. Mo. 1979), *aff'd*, 622 F.2d 415 (8th Cir. 1980), *aff'd*, 454 U.S. 100 (1981); *Franchise Tax Board of California v. Alcan Aluminium Limited*, 493 U.S. 331 (1990); *Todd v. Johnson*, 718 F. Supp. 1305 (S.D. Miss. 1989); *Waldron v. Collins*, 788 F.2d 736 (11th Cir. 1986).

Furthermore, as is set forth in the Statement of Facts, the Iowa courts will be deciding the issue of whether *Davis v. Michigan Dept. of Treasury* should operate retroactively in a test case being litigated by the National Association of Retired Federal Employees entitled *Hagge v. Iowa Department of Revenue and Finance*, Docket No. 90-20-2-0216. Also, this issue was before the United States Supreme Court in two cases from Virginia (*Harper v. Virginia Dept. of Taxation*, No. 90-1685, and *Lewy v. Va. Dept. of Taxation*, No. 90-1772) and one from South Carolina (*Bass v. South Carolina*, No. 90-673). These cases were vacated and remanded [59 U.S.L.W. 3864 (U.S. June 28, 1991)] for reconsideration in light of *James B. Beam Distilling Company v. Georgia*, 59 U.S.L.W. 4735 (U.S. June 20, 1991). All these cases present the issue of whether *Davis*

v. Michigan Dept. of Treasury should be applied retroactively or prospectively. Therefore, assuming arguendo that the federal district court has jurisdiction to hear Petitioners' claim for refunds, the merits of that claim should be resolved before this Court could review this case and remand it to the district court, the district court decide the issue, and appeals be exhausted from the district court's decision.

II. THE DISTRICT COURT'S DECISION TO DISMISS PETITIONERS' TAX REFUND CLAIM, WHICH WAS AFFIRMED BY THE EIGHTH CIRCUIT COURT OF APPEALS, IS CONSISTENT WITH PRIOR PRECEDENTS LITIGATED UNDER THE TAX INJUNCTION ACT (28 U.S.C. § 1341) AND THE PRINCIPLE OF COMITY, AND NO UNSETTLED IMPORTANT QUESTIONS OF FEDERAL LAW HAVE BEEN PRESENTED BY PETITIONERS.

The district court did not have jurisdiction over this action requesting a refund of income taxes. The Tax Injunction Act (28 U.S.C. § 1341) states:

> The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

The jurisdictional prohibition which prevents federal district courts from interfering with the administration of state tax systems has been clearly outlined by the courts. *See, e.g., Rosewell v. LaSalle National Bank*, 450 U.S. 503 (1981); *Fair Assessment in Real Estate Ass'n v. McNary*, 478 F. Supp. 1231, 1234 (E.D. Mo. 1979), *aff'd*, 622 F.2d 415 (8th

Cir. 1980), *aff'd*, 454 U.S. 100 (1981); *Franchise Tax Board of California v. Alcan Aluminium Limited*, 493 U.S. 331 (1990); *Moss v. State of Georgia*, 655 F.2d 668, 669 (5th Cir. 1981). The jurisdictional barrier does not depend upon the form of relief that the taxpayer seeks. It applies not only to actions seeking injunctive relief, but also to actions for *refund of tax paid* or for damages. *Fair Assessment in Real Estate Ass'n v. McNary*, 478 F. Supp. 1231, 1233 (E.D. Mo. 1979), *aff'd*, 622 F.2d 415 (8th Cir. 1980), *aff'd*, 454 U.S. 100 (1981); *Marvin F. Poer and Co. v. Counties of Alamedo*, 725 F.2d 1234, 1236 (9th Cir. 1984); *Moss v. State of Georgia*, 655 F.2d 668, 669 (5th Cir. 1981). Furthermore, the prohibitions of 28 U.S.C. § 1341 cannot be evaded by framing the complaint as one for declaratory relief. *California v. Grace Brethren Church*, 457 U.S. 393, 411 (1982); *Franchise Tax Board of California v. Alcan Aluminium Limited*, 493 U.S. 331 (1990).

All that is required by § 1341 is "a state court remedy that meets certain minimal *procedural* criteria." *Rosewell v. LaSalle National Bank*, 450 U.S. at 512 (emphasis in original); *Todd v. Johnson*, 718 F. Supp. 1305 (S.D. Miss. 1989) (military retirees were denied access to federal court in a *Davis v. Michigan* type of case). The state remedy need not "be the best remedy available or even equal to or better than the remedy which might be available in the federal courts." *Bland v. McHann*, 463 F.2d 21, 29 (5th Cir. 1972), *cert. denied*, 410 U.S. 966 (1973). *Accord Waldron v. Collins*, 788 F.2d 736, 738 (11th Cir. 1986); *Todd v. Johnson*, 718 F. Supp. 1305, 1308 (S.D. Miss. 1989); *Melof v. Hunt*, 718 F. Supp. 877, 883 (M.D. Ala. 1989) (all these cases involve lawsuits in *Davis v. Michigan* type of cases pertaining to federal or military retirees). *See Rosewell*, 450 U.S. at 515

(disallowance of interest under state law does not render state remedy inadequate).

The Iowa law provides for a full hearing before the agency and judicial review which allows Petitioners to raise any and all legal arguments including constitutional objections concerning the request for income tax refunds. *See* Iowa Code §§ 421.10 and 422.28 (1991); 701 Iowa Admin. Code § 7.8; Iowa Code §§ 17A.19 and 422.29 (1991). Therefore, the § 1341 requirement concerning adequate state remedies is satisfied.

Petitioners' action for refunds of income taxes paid is further barred in federal court by the principle of comity, where there are plain, adequate, and complete state remedies available. *Fair Assessment in Real Estate v. McNary*, 454 U.S. 100 (1981); *Todd v. Johnson*, 718 F. Supp. 1305, 1307 (S.D. Miss. 1989) (military retirees barred access to federal court in a *Davis v. Michigan* type of case). There is no difference between remedies which are "plain, adequate, and complete" for purposes of the principles of comity and those which are "plain, speedy and efficient" within the meaning of 28 U.S.C. § 1341. *Fair Assessment*, 454 U.S. at 116 n. 8.

The Supreme Court in *Fair Assessment* examined the comity principle. The Court discussed the local concern in the collection of taxes and federal court reluctance to interfere with state fiscal operations, and summarized its concerns by quoting the district court with approval:

> "To allow such suits would cause disruption of the states' revenue collection systems equal to that caused by anticipatory relief. State tax collection officials could be summoned into federal court to defend their assessments *against claims*

> *for refunds* as well as prayers for punitive damages, merely on the assertion that the tax collected was willfully and maliciously discriminatory against a certain type of property. Allowance of such claims would result in this Court being a source of appellate review of all state property tax classifications." Fair Assessment in Real Estate Assn. Inc. v. McNary, 478 F.Supp. 1231, 1233-1234 (1979).

454 U.S. at 114 (emphasis added).

Petitioners cannot show that there were inadequate state remedies available to them. In fact, the named petitioner, E. J. McManus, did pursue his remedy by filing a refund claim pursuant to Iowa Code § 422.73(2) (1991). In the aftermath of *Davis v. Michigan*, thousands of other Iowa taxpayers have also filed refund claims pursuant to Iowa Code § 422.73(2) (1991). There are taxpayers willing to pursue their remedies for income tax refund claims in state litigation. Rather than litigating thousands of cases at the same time, there is a test case in Iowa concerning the application of *Davis v. Michigan*. *Hagge v. Iowa Department of Revenue and Finance*, Docket No. 90-20-2-0216, will be heard by the Director of Revenue and Finance on July 30, 1991. Obviously, Mr. Hagge and the National Association of Retired Federal Employees believe they have a "plain, speedy and efficient" remedy.

The state of Iowa and the Iowa Department of Revenue and Finance will abide by the Iowa Supreme Court decision on judicial review of *Hagge v. Iowa Department of Revenue and Finance*, Docket No. 90-20-2-0216, (or any other applicable Iowa or United States Supreme Court decisions) for all federal civil service retirees. If refunds must be paid, they will be paid with interest.

The named petitioner (E. J. McManus) has several options, as do "all others similarly situated" included as petitioners. To date, he has expressed no interest in pursuing his state remedies. Furthermore, if unwilling to await the outcome of the Iowa test case and/or similar cases pending in other states which may be presented to the United States Supreme Court, he can take judicial review of the Department's failure to act on his refund claim. *See* Iowa Code § 17A.2(9) (1991) ("agency action" includes "a failure to act, or any other exercise of agency discretion or failure to do so, or the performance of any agency duty or the failure to do so"). His petition for judicial review would *not* be limited to the thirty day filing limitation. Iowa Code § 17A.19(3) (1991) provides that "[i]n cases involving a petition for judicial review of agency action other than the decision in a contested case, the petition may be filed at any time petitioner is aggrieved or adversely affected by that action." *See Oliver v. Teleprompter Corp.*, 299 N.W.2d 683, 687 (Iowa 1980) (thirty day limit for filing petition for judicial review applies only to appeals from contested case decisions, not to "other agency action").

It is clear that, once a refund claim is denied, Iowa Code § 421.10 (1991) and 701 Iowa Admin. Code § 7.8 provide Petitioners with an adequate remedy. These provisions of Iowa law state:

> **§ 421.10 Appeal period – denial of taxpayer's claim.**
>
> The appeal period for revision of assessment of tax, interest, and penalties set out under section . . . *422.28*, . . . applies to appeals to notices from the department denying changes in

> filing methods, *denying refund claims,* and *denying portions of refund claims for the tax covered by that section.*

(Emphasis added).

> **701-7.8(17A) Protests.** Any person wishing to contest an assessment, *refund claim, or any other department action,*. . . . shall file a protest, in writing, with the department . . . to the director for a hearing. The protest must be either delivered to the department by United States Postal Service, by ordinary, certified, or registered mail, directed to the attention of the administrative law judge, personally delivered to the office of the administrative law judge, or be served on the department by personal service.

(Emphasis added). Petitioners continue to ignore these provisions of Iowa law even though they were cited in the Iowa Department of Revenue and Finance brief filed in the federal district court.

Contrary to the claim at page 15 of the Petition for Writ of Certiorari, the Iowa Department of Revenue and Finance is not trying to "hold the taxpayers at bay." The Department is keeping Iowa taxpayers informed of developments on the tax refund issue in its *Tax News* letter. (See App. 1a)

Petitioners speculate that their remedy is not plain, speedy and efficient under the Tax Injunction Act (28 U.S.C. § 1341). The Tax Injunction Act is not made inapplicable because of Petitioners' mere speculations. *Franchise Tax Board of California v. Alcan Aluminium Limited,* 493 U.S. 331 (1990).

At pages 19-22 of the Petition for Writ of Certiorari, Petitioners cite to various Indian cases. Since Petitioners

are not an Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, these cases do not apply to the Petitioners' tax refund claims. *See Moe v. Salish & Kootenai Tribes*, 425 U.S. 463, 472-73 (1976) (legislative history of 28 U.S.C. § 1362 indicated a congressional purpose to permit Indian tribes to sue under this section in federal court).

Petitioners also cite to *Housing Authority, Etc. v. State of Washington*, 629 F.2d 1307 (9th Cir. 1980), which discusses the various Indian cases cited by the Petitioners. That case clearly indicates that the Indian cases do not support the Petitioners' argument. The case states:

> Cases involving Indian tribes as plaintiffs present special considerations. The moral and legal obligations of the United States toward Indian tribes place the tribes in a special posture when seeking relief in federal courts. This special posture has been codified in 28 U.S.C. § 1362. . . .
>
> . . . .
>
> Without an explicit directive from Congress analogous to § 1362, we are reluctant to extend the "special interest" rationale beyond its application to Indian tribes.

629 F.2d at 1312-13.

III. THE DISTRICT COURT'S DECISION TO DISMISS PETITIONERS' TAX REFUND CLAIM, WHICH WAS AFFIRMED BY THE EIGHTH CIRCUIT COURT OF APPEALS, IS SUPPORTED BY THE ELEVENTH AMENDMENT.

Although the district court's decision was based on the Tax Injunction Act (28 U.S.C. § 1341), the decision to

dismiss the Petitioners' tax refund claim is also supported by the eleventh amendment. The eleventh amendment to the United States Constitution states:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

In *Edelman v. Jordan*, 415 U.S. 651, 662-63 (1974), this Court held that a federal court's remedial power under the eleventh amendment is limited to prospective injunctive relief and may *not* include a retroactive award *which requires the payment of funds from the state treasury.*[1] *Accord Melof v. Hunt*, 718 F. Supp. 877 (M.D. Ala. 1989) (a lawsuit filed in the aftermath of the U. S. Supreme Court's decision in *Davis v. Michigan Department of Treasury*, 489 U.S. 803 (1989)).

Petitioners' argument that 42 U.S.C. § 1983 and 4 U.S.C. § 111 give the federal court jurisdiction is without merit.[2] *See Quern v. Jordan*, 440 U.S. 332, 338 (1979) (in enacting § 1983 Congress did not intend to abrogate the sovereign immunity of the states guaranteed by the eleventh amendment).

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[1] *Edelman* made it clear that the eleventh amendment bars suits brought in federal court by the state's own citizens as well as by citizens of another state. 415 U.S. at 662.

[2] Section 111 is a codification of the United States Supreme Court's modern constitutional doctrine of intergovernmental tax immunity. *Davis v. Michigan Department of Treasury*, 489 U.S. at 812-13.

Congress has the authority to permit a suit for monetary damages against a state in federal court when legislating pursuant to § 5 of the fourteenth amendment or the commerce clause. *Atascadero State Hospital v. Scanlon*, 473 U.S. 234 (1985); *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989). Petitioners appear to argue at page 25 of the Petition for Writ of Certiorari that 4 U.S.C. § 111 stems from the commerce clause (article I, § 8). Assuming arguendo that 4 U.S.C. § 111 was passed pursuant to the fourteenth amendment or the commerce clause, an intent to sweep away the immunity of the states cannot be inferred from this fact alone. Not only must there be a showing that legislation was adopted by Congress pursuant to the powers granted under the fourteenth amendment or the commerce clause but, further, Congress must show this intention to abrogate the states' immunity in *unmistakably clear language in the statute. Atascadero State Hospital v. Scanlon*, 473 U.S. 234 (1985); *Pennsylvania v. Union Gas Company*, 491 U.S. 1 (1989); *Hoffman v. Connecticut Income Department*, 492 U.S. 96 (1989); *Dellmuth v. Muth*, 491 U.S. 223 (1989). Petitioners have not shown that Congress unequivocally set forth in the statute that it intended to abrogate the states' eleventh amendment immunity from suit in federal court.

Petitioners cite to 42 U.S.C. § 2000d-7(a)(l) as authority for the argument that Congress intended to abrogate the states' eleventh amendment immunity from suit in federal court. 42 U.S.C. § 2000d-7(a)(l) states:

> **§ 2000d-7. Civil rights remedies equalization**
>
> **(a) General provisions.** (1) A State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in

> Federal court for a violation of section 504 of the Rehabilitation Act of 1973 [29 USCS § 794], title IX of the Education Amendments of 1972, the Age Discrimination Act of 1975, title VI of the Civil Rights Act of 1964, or the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance.

Petitioners claim that the language "or the provisions of any other federal statute prohibiting discrimination by recipients of federal financial assistance" is this so-called expressed intention of Congress to abrogate the states' eleventh amendment immunity from suit in federal court. (Petition for Writ of Certiorari p. 25). Petitioners ignore the fact that 4 U.S.C. § 111 pertains to "pay or compensation for personal service"[3] while 42 U.S.C. § 2000d-7(a)(1) pertains to "recipients of federal financial assistance," an entirely different subject matter.

In summary, not only do 4 U.S.C. § 111 and 42 U.S.C. § 2000d-7(a)(1) concern entirely different subject matters but, further, there is no evidence that Congress in unmistakably clear language in 4 U.S.C. § 111 abrogated the

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[3] 4 U.S.C. § 111 states:

> The United States consents to the taxation of *pay or compensation for personal service* as an officer or employee of the United States, a territory or possession or political subdivision thereof, the government of the District of Columbia, or an agency or instrumentality of one or more of the foregoing, by a duly constituted taxing authority having jurisdiction, if the taxation does not discriminate against the officer or employee because of the source *of the pay or compensation*.

(Emphasis added).

states' eleventh amendment immunity from suit in federal court for refund of taxes (assuming arguendo that 4 U.S.C. § 111 was passed pursuant to article I, § 8 of the United States Constitution).

CONCLUSION

Petitioners' complaint was properly dismissed for lack of subject matter jurisdiction by the United States District Court, as affirmed by the United States Court of Appeals for the Eighth Circuit. The eleventh amendment, the Tax Injunction Act (28 U.S.C. § 1341) and the principle of comity bar the federal court from hearing the Petitioners' tax refund claim. For all of the above stated reasons, the Department of Revenue and Finance respectfully requests that Petitioners' Petition for Writ of Certiorari be denied.

Respectfully submitted,

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TAX NEWS

VOLUME XVI | NUMBER 1 | AUGUST 1990

From the Office of the Director

In ruling in Davis v. Michigan that 4 U.S.C. §111 prohibited the disadvantageous taxation of federal employee retirement benefits comparative to state and local government employee retirement income, the U.S. Supreme Court initiated a chain of events not yet concluded.

Some 27 states, including Iowa, were impacted by the Courts' ruling. Most have now amended state law in conformity with the Davis decision, providing equality of taxation of federal retirement benefits.

The issue still unresolved in 19 of these states, including Iowa, is whether the Davis decision is to be applied prospectively from 1989 or retroactively, entitling thousands of federal retirees to refunds in these states for tax years prior to 1989.

An Iowa case is currently pending in administrative process on the issue of retroactivity of the Davis decision. This case may be appealed to the Iowa Supreme Court, where we will finally achieve resolution of the status of the 30,000 amended Iowa returns filed by federal retirees. A similar case pending appeal in South Carolina, however, may bring resolution prior to this case reaching the Iowa Supreme Court.

I must stress that the appeal process will be lengthy. We do not anticipate that this issue will be resolved for many months. We will, however, keep you apprised of any developments through future issues of the "Tax News".

Sincerely,

G.D. Bair

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